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No. 03-531

IN THE

Supreme Court of the United States

YARDARM RESTAURANT, INC.,

Petitioner,

v.

THE CITY OF POMPANO BEACH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE FOURTH DISTRICT

MOTION OF THE BROWARD COUNTY LEAGUE OF CITIES, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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MOTION TO FILE AMICUS CURIAE BRIEF

Comes now the Broward County League of Cities, Inc., a Florida Non-Profit Corporation, pursuant to Supreme Court Rule 37.2, and hereby moves for leave to file an Amicus Curiae Brief in support of Respondent, City of Pompano Beach. Respondent has consented in writing to the filing of this brief. Petitioner's counsel has advised the undersigned counsel counsel that Petitioner also consents, but the undersigned did not receive written verification of such consent prior to the time is was necessary to finalize and copy the proposed *Amicus Curiae* Brief for filing by December 8, 2003. A copy of the proposed *Amicus Curiae* Brief is attached hereto.

As more fully explained on page 1 of the attached brief, the Broward County League of Cities, Inc. (the "League") is comprised of approximately thirty (30) municipalities in Broward County, Florida. The League reviews, addresses and promotes interests of local government common to the municipalities of Broward County, Florida. The League is well positioned to address the issues presented in the Petition and the *Amicus Curiae* that support Petitioner's arguments, and the ramifications on municipalities of granting the requested relief.

The League is seeking to participate in this case due to the dangers to local government should the relief requested by Petitioner, as well as *Amicus Curiae* supporting Petitioner, be granted. In particular, the dramatic exposure that would befall local government should this Court accept Petitioner's invitation to expand liabilities to executive actions, and to create an undefined new form of liability in cases that do not meet current federal constitutional standards for relief. If such were to occur, the floodgates of federal litigation would be thrust wide open, and local planning and development actions would be severely and adversely affected.

Accordingly, the League respectfully requests that this Court grant leave to file the attached *Amicus Curiae* Brief.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTRODUCTION	1
SUMMARY OF ARGUMENTS FOR DENYING THE PETITION	2
I. THE FLORIDA FOURTH DISTRICT COURT OF APPEAL APPLIED THE CORRECT LAW IN DISTINGUISHING BETWEEN "LEGISLATIVECONDUCT" AND "EXECUTIVE CONDUCT"	3
II. THE RELIEF REQUESTED BY THE PETITIONER IN SECTION V OF THE PETITION, THAT THIS COURT CREATE A NEW CONSTITUTIONAL BASIS FOR RELIEF IN CASES THAT DO NOT MEET THE CURRENT STANDARDS FOR RELIEF WOULD BE DISASTROUS	6
CONCLUSION	8

TABLE OF CITED AUTHORITIES

Page

Cases

Agins v. City of Tiburon,
447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) 2

City of Pompano Beach v. Yardarm Restaurant, Inc.,
834 So.2d 861 (Fla. 4th DCA 2003) 2, 4

McKinney v. Pate,
20 F.3d 1550 (11th Cir. 1994 (en banc), *cert. denied*, 513 U.S. 1110, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995) 5

Metropolitan Dade County v. Betancourt,
559 So.2d 1237 (Fla. 3rd DCA 1990) 4

Statute

42 U.S.C. § 1983 3

INTRODUCTION

Comes now the Broward County League of Cities, Inc., a Florida Non-Profit Corporation, pursuant to Supreme Court Rule 37.2, and files this *Amicus Curiae* Brief in support of Respondent, The City Of Pompano Beach. Written consent for participation in this case by the Broward County League of Cities was granted by counsel of record for the Petitioner Respondent. Oral consent was obtained from the Petitioner's counsel, however written acknowledgement of Petitioner's consent was not received by counsel prior to filing this brief. Copies of such consent is being lodged herewith.[1]

The Broward County League of Cities, Inc. (the "League") is comprised of approximately thirty (30) municipalities in Broward County, Florida. The League reviews, addresses and promotes interests of local government common to the municipalities of Broward County, Florida. Issues relating to property rights and recovery for damages directly impact on the members of the League. The League is seeking to participate in this case due to the dangers which would affect local government should the relief requested by Petitioner, as well as *Amicus Curiae* supporting Petitioner, be granted. Such relief would have a chilling affect on the day-to-day operations of local government relating to land development and building issues, and would open the floodgates to disgruntled property owners who desire to make a federal case out of any decision by a

1. Pursuant to Rule 37.6, *Amicus Curiae* Broward County League of Cities, Inc. affirms that no counsel for any party in this case authored, in whole or in part, this brief. The Respondent is a member of the Broward County League of Cities. Other than the Broward County League of Cities as a whole, no person or entity (including Respondent) has made a monetary contribution specifically for the preparation or submission of this brief.

local building or zoning official that adversely impacts on that property owner's *perceived* development interests.

In particular, the distinction between legislative action and executive action in the local government context is paramount to ensuring that day-to-day decisions of municipal officers and employees tasked with enforcing and interpreting building and zoning ordinances and regulations, do not prematurely expose local governments to the extreme risks of a Federal damages claim, denying elected officials the opportunity of addressing such issues prior to property owners taking municipalities to Federal court.

Section V of the Petition is extremely troublesome to the members of the League, and should alarm all local governments across the United States. Petitioners are requesting this Court to create a new remedy in cases that do not meet current takings standards. This lower threshold for constitutional relief must be rejected, for to endorse such would create uncertainties that would open the door to federal litigation in just about any situation where a local government acts inconsistent with a property owner's wishes.

SUMMARY OF ARGUMENTS FOR DENYING THE PETITION

The Petition for Writ of Certiorari should be denied by this Court. The decision of the Florida Fourth District Court of Appeal in *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 834 So.2d 861 (Fla. 4th DCA 2003), is correct and consistent with all applicable precedence, including previous decisions of this Court such as *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). The League assumes that Respondent will address much of the legal arguments advanced by Petitioner, and so it will not belabor this Court with its own analysis.

Unfortunately, it appears that the Petitioner, and *Amicus Curiae* who support Petitioner's position, are using the lower court decision as an opportunity to change and expand the current law, and lower the threshold of relief for property owners. Petitioners and the *Amicus Curiae* that support it may not like the law, but it is the law and there is no reason change it. Such action by this Court would open the proverbial floodgates of litigation in federal courts relating to takings and due process claims for even the most routine zoning and planning decisions. Any change or expansion of relief as sought by Petitioner and the *Amicus Curiae* that support it would adversely and severely affect the ability of local governments to regulate and oversee development on behalf of the public as a whole. The League has filed this brief to advise this Court of the practical implications of the Petitioner's arguments and the relief requested therein.

I. THE FLORIDA FOURTH DISTRICT COURT OF APPEAL APPLIED THE CORRECT LAW IN DISTINGUISHING BETWEEN "LEGISLATIVE CONDUCT" AND "EXECUTIVE CONDUCT"

The Petitioner and *Amicus Curiae* plead with this court to expand municipal liability by allowing actions and decisions of City officers and employees, known as "executive" actions, to expose the municipality to liability for a substantive due process claim under 42 U.S.C. § 1983. Should the Court do so, it will impose upon the federal judiciary the responsibility of being a super-administrative agency, reviewing everyday decisions of building and zoning officials. As noted by the Fourth District Court in this case, "[t]he acts complained of consisted of delays in issuing building permits, wrongful revocation of building permits, delays in [zoning] reviews, and an attempted repeal of a

special exception." *Id.* at 870.[2] As found by the Florida Fourth District Court of Appeal, none of these actions were legislative in nature. Some of these actions, such as delays in issuing permits and delays in zoning review, are common occurrences in municipalities, caused by reasons too numerous to list. Potential routine review of delays in federal court would hamstring municipal government's land planning and building review.

Everyday, hundreds of building and zoning officials are reviewing, approving, or denying applications for building permits, site plans and other development and building requests. Unfortunately, many of these applications are delayed either through sheer volume of work and prioritization by these officials, or due to disagreements with applicants as to interpretations of building or zoning regulations. Each and every application will involve decisions by these officials that may not be well-received by property owners. Review of these decisions in federal court under a substantive due process claim will open the door to federal court review of limitless numbers of every day decisions to make ultimate factual determinations of reasonableness or arbitrariness. This potential floodgate of claims cannot and should not be permitted.

It is important to remember that executives without "final policy-making authority"[3] ultimately answer to those persons with final policy-making authority, i.e. the legislative

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2. A special exception is generally a use permitted by a local zoning code only after certain conditions are met and a public hearing conducted. *See e.g., Metropolitan Dade County v. Betancourt,* 559 So.2d. 1237 (Fla. 3rd DCA 1990).

3. *City of Pompano Beach,* 834 So.2d. at 869.

body of the City. The legislative body operates as a check on executive decision-making authority. This fact belies the misguided argument advanced by *Amicus Curiae* Sugar Cane Growers Cooperative of Florida, on page 11 of its brief that the decision below "will positively encourage municipal decision makers to create arbitrary and capricious roadblocks for owners[.]" The ultimate decision makers in municipalities are the elected officials, who sit on governing bodies and act legislatively.

As observed by the court in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994 (en banc), *cert. denied*, 513 U.S. 1110, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995), legislative actions are held to a higher standard in that they apply to larger segments of society. The distinction between executive and legislative actions is critical in the land development arena. To open the door to challenges of executive actions would be to condone immediate court challenges to any adverse decision in normal day-to-day review of building and zoning matters. This would effectively remove the opportunities for municipal governing bodies to address the issues prior to the municipality and its taxpayers being exposed to defending a federal lawsuit, simply because a property owner disagrees with a decision of a building or zoning official.

II. THE RELIEF REQUESTED BY THE PETITIONER IN SECTION V OF THE PETITION, THAT THIS COURT CREATE A NEW CONSTITUTIONAL BASIS FOR RELIEF IN CASES THAT DO NOT MEET THE CURRENT STANDARDS FOR RELIEF, WOULD BE DISASTROUS

In Section V of the Petition, Petitioner urges this court to create a totally new cause of action apparently heretofore not recognized in over two centuries of this Court's constitutional property rights jurisprudence. It argues that a parade of horribles that allegedly occurred in this case justify some un-quantifiable leap in jurisprudence to provide a cause of action in cases that do not meet the current legal standards for takings or due process claims. This court, respectfully, should decline to do so.

Current jurisprudence provides adequate protections for all property owners. If the facts of a case support a claim for a taking, or substitutive due process claim, the property owner may obtain relief to which he or she would be entitled. The new relief sought by Petitioners is ambiguous at best, and would encourage federal litigation in even the most routine disagreements between municipalities and property owners.

Petitioners fail to adequately explain to the Court what types of infringements would expose a municipality to potential liability. If actions of a local governing body delays issuance of a permit, should a federal court step in and award money to the applicant solely for the delay? For example, if the delay causes a fluctuation in interest rates to adversely affect a developer, is a municipality facing a federal lawsuit and damages resulting from such harm? Depending on the

scope of the project, or the affect on the property owner, such could be asserted to be "serious damage." Petitioner wants this Court to create a right for a property owner to march to the nearest federal courthouse and obtain relief.

Combining it with Petitioner's request to have this Court change the law and have executive actions be subject to substantive due process claims, the standard and relief sought by the Petitioner in Section V of the Petition would result in the potential for federal courts being asked to resolve just about every disagreement between a property owner and a municipality over development rights and applications. Under Petitioner's argument, theoretically, if a building official interpreted a local building code in a manner not favored by a property owner which required additional time to resolve, the property owner could sue in federal court if it turned out the building official was incorrect. Ultimately, there may be factual issues that need to be resolved, but the specter of federal court litigation would hang over the head of otherwise diligent municipal planners and building officials. Access to federal courts would be turned into a sword to be wielded against municipalities instead of a shield for property owner rights.

Just as property owners demand protection of their rights, municipalities are entitled to be able to rely on reasonably defined legal standards in order to ensure that actions taken by the municipality do not violate the law. Current takings and due process Constitutional causes of action provide the requisite guidance and protections. Opening the doors to additional causes of action, that would be based on just about any action by a municipal building or zoning official, would create havoc for municipalities. The federal courts would be injected into in the everyday disagreements. Such a drastic

change in the current state of the law would certainly open the floodgates for litigation. It would result in federal courts overseeing everyday decisions, a role best left to administrators.

CONCLUSION

The Petition should, respectfully, be denied.

Respectfully submitted,

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